



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 16-01100
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2018

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the foreign influence, personal conduct, and sexual behavior concerns raised by his affair with a Chinese national and his continued contact with her after being directed by his employer to terminate the relationship. Clearance is denied.

Statement of the Case

On October 10, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the foreign influence, personal conduct, and sexual behavior guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's security

¹ The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on September 1, 2006.

clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. On September 8, 2017, I issued a prehearing order to the parties regarding the exchange and submission of discovery, the filing of motions, and the disclosure of any witnesses, and the parties complied.² At the hearing, convened on September 28, 2017, I admitted Government's Exhibits (GE) 1 through 3, without objection. Applicant did not offer any documents. I received the transcript (Tr.) on October 6, 2017.

Procedural Matters

Implementation of Revised Adjudicative Guidelines

While the case was pending decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing the National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The 2017 AG superseded those implemented in September 2006, and they are effective for any adjudication made on or after June 8, 2017. Accordingly, I have decided this case under the 2017 AG.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about China. Without objection from Applicant, I approved the request. Relevant facts are noted below.³

Findings of Fact

Applicant, 33, has worked for his current employer since October 2014 as technician. He served in the U.S. Air Force from 2003 to 2010 and received a honorable discharge. Applicant was granted access to classified information in 2003 and was upgraded to access to sensitive compartmented access (SCI) in 2007. In 2011, Applicant began working for a federal contracting company, servicing a contract held by a government agency. Under the terms of his employment, he was required to report all contacts with foreign nationals. A review of Applicant's security clearance eligibility was initiated in March 2012 after he self-reported a romantic relationship with a woman who was a Chinese national.⁴

² The prehearing scheduling order and the discovery letter are appended to the record as Hearing Exhibits (HE) I and II.

³ The Government's administrative notice summary and attached documents are admitted to the record as HE III.

⁴ GE 1; Tr. 14-15.

In January 2012, Applicant met the woman at a shopping mall and they became friends. The woman informed Applicant that she was married and not interested in a romantic relationship. He reported the contact to his facility security officer (FSO) nine days after their initial meeting. The FSO advised Applicant to report any developments in the relationship to the security office. Although the relationship became intimate in late January or early February 2012, Applicant did not update his foreign contact report until March 2012 because he was unsure if the relationship would be long term. After he made the updated report, the security officer asked Applicant for more information about the woman and her family. Applicant learned that the woman's husband was a member of the Chinese military and that her father previously worked for the Chinese military. Applicant claims that he did not know the details of either man's job, but admitted that the woman told him that a non-disclosure agreement prevented her from disclosing details of her husband's job to third parties.⁵

The FSO informed Applicant that if he continued the relationship, his employer would remove him from the contract, which involved China – a country known to engage in acts of espionage against the United States through a variety of methods, including the exploitation of personal relationships. At the time, Applicant's employer had no other open positions. Applicant's employer gave him the weekend to consider his options. The following week, Applicant informed his employer that he terminated the relationship. Applicant submitted to a counterintelligence (CI) interview and signed a security agreement, promising that he would have no further contact with the woman. In a second CI interview days later, the FSO warned Applicant that continued contact with the woman would result in the termination of his employment. The FSO also advised Applicant to report any attempts by the woman to contact him to the security office for guidance.⁶

In May 2012, Applicant completed a security clearance application. He disclosed his contact with the Chinese national, indicating that their last contact occurred in April 2012 and that he expected no contact with her in the future. He reiterated these statements in a September 2012 background interview.⁷

In February 2014, Applicant submitted to a polygraph examination. In the pretest interview, Applicant admitted that he and the Chinese national kept in touch by email after he signed the April 2012 security agreement. He told the polygrapher that he could not remember if they decided to maintain contact before or after he signed the security agreement. The couple emailed each other once per month on the anniversary of the day they met. Applicant stated that the email contact ended in August 2013, when his new girlfriend found out about the emails and demanded Applicant cease contact.⁸

⁵ GE 3; Tr. 16, 23-25.

⁶ GE 3; Tr. 25-27.

⁷ GE 2; Tr. 28-29.

⁸ GE 3; Tr. 27.

During the posttest, the polygrapher informed Applicant that he had physiological responses to questions about his contacts with foreign nationals and again asked Applicant about his last contact with the Chinese national. Applicant admitted that the two spent time together in October 2012 before she returned to China and continued emailing each other until November 2013, when Applicant's new girlfriend discovered the continuing contact and wrote emails to the woman in November and December 2013. Applicant received another email from the Chinese national in January 2014. Applicant drafted a response to apologize for his girlfriend's emails. He deleted the response when he received scheduling notification for the polygraph test. He admitted that he still had some feelings for her, but ended contact to appease his new girlfriend.⁹

At the hearing, Applicant admitted that when he signed the 2012 security agreement, he did so knowing that he intended to maintain contact with the Chinese national. He also admits that he lied about the continuing contact on his 2012 security clearance application and during his September 2012 background interview. According to Applicant:¹⁰

I didn't perceive her a threat to national security. I mean, that's why it also kind of made it that much harder. I'm not really supposed to be a judge on that in those matters, but she never asked any prying questions about my work or any classified information. I never got contacted by anyone from her family or from China about anything. So the risk to me, at least, was always minimal.¹¹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an Applicant's eligibility for access to classified information.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of national security." Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

⁹ GE 3; Tr. 16-22, 29-30.

¹⁰ Tr. 26-28.

¹¹ Tr. 20.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

The record establishes the Government’s *prima facie* case under the foreign influence, personal conduct, and sexual behavior guidelines. The record establishes that Applicant engaged in an affair with a married, Chinese foreign national whose husband was a member of the Chinese military and whose father had ties with the same.¹² This relationship created a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion.¹³ This risk was exacerbated by the fact that Applicant failed to report or fully disclose, when required, to his employer and the agency he supported, the extent of his association with the Chinese national.¹⁴ Applicant also violated a written commitment made to his employer as a condition of his employment to end the relationship and cease all contact with the woman.¹⁵

Because Applicant no longer has contact with the Chinese national, the foreign influence concern is mitigated and resolved in his favor. However, the sexual behavior and personal conduct concerns remain. After reviewing the relevant mitigating conditions under each guideline, I find that none of the relevant mitigating conditions apply. Applicant maintained a relationship with a foreign national for one and one-half years after he knew that doing so was incompatible with his obligations as a clearance holder. He knowingly lied to and actively concealed the ongoing contact from his employer, the agency he supported, and his girlfriend. He only admitted the conduct when he was forced to do so. Applicant’s actions are neither minor, nor mitigated by the passage of time. His actions continue to reflect negatively on his ongoing security worthiness. When presented with a conflict of interest between his self-interest and his fiduciary duties as a clearance holder, Applicant cannot be relied upon to resolve that conflict in the interest of the United States.

¹² AG ¶ 7(b) and AG ¶ 13(c).

¹³ AG ¶ 7(a).

¹⁴ AG ¶ 7(c).

¹⁵ AG ¶ 16(f).

Whole-Person Concept

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances.¹⁶ Applicant's conduct raises concerns about his judgment, reliability, and trustworthiness that make his continued access to classified information an unacceptable security risk.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Foreign Influence:	FOR APPLICANT
Subparagraph 1.a – 1.c:	For Applicant
Paragraph 2, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant
Paragraph 3, Sexual Behavior:	AGAINST APPLICANT
Subparagraphs 3.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

Nichole L. Noel
Administrative Judge

¹⁶ *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988).